

February 15, 2005

EX PARTE - VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Letter of ICG, Volo and Dialpad in Level 3 Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266; In the Matter of IP-Enabled Services, WC Docket No. 04-36.

Dear Ms. Dortch:

ICG Communications (“ICG”),¹ Volo Communications, Inc. (“Volo”)² and Dialpad Communications, Inc. (“Dialpad”)³ (collectively the “Joint Commenters”) submit this letter in support of Level 3 Communications LLC’s (“Level 3”) Petition for Forbearance (the “Petition”) filed with the Federal Communications Commission (“FCC” or “Commission”) in the above referenced docket.⁴

¹ ICG is a communications and an information services provider providing IP-enabled service offerings including broadband, dedicated Internet access and VoIP. ICG also provides facilities-based local exchange and interexchange services to business customers in Colorado, Ohio, Texas and much of the southeastern United States. More information on ICG is available at <http://www.icgcomm.com>.

² Volo is a facilities-based CLEC and information services provider offering end-to-end wholesale voice and data solutions and IP-based applications to carriers and service providers through its own proprietary VoiceOne network. More information is available on Volo at <http://www.volocommunications.com>.

³ Dialpad is a communications and information services provider providing IP-enabled service offerings including broadband phone service, VoIP-based calling card service, and PC-to-Phone VoIP services in the United States and international markets. More information is available on Dialpad at <http://www.dialpad.com>.

⁴ See *Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) (“Level 3 Petition” or “Petition”).

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The Joint Commenters understand that Level 3's Petition, if granted by the Commission, would maintain the status quo by preventing the imposition of access charges on certain Internet Protocol ("IP") enabled voice traffic exchanged between non-rural carriers⁵ and ensure that such traffic falls under the reciprocal compensation system. Grant of Level 3's Petition is critical to removing a cloud of regulatory uncertainty that is hampering innovation in IP enabled services, forestalling more competitive pressure on retail prices for communications services and reducing the deployment of broadband services. Providers of IP enabled services, and their investors, are justifiably concerned about this issue because the imposition of access charges would have a significant adverse impact on their costs and bottom line. In contrast, affirming the status quo for the transitional period during which the FCC completes broad-based intercarrier compensation reform would not "bankrupt" universal service. Record evidence shows that the "cost" of granting the Petition (in the form of forgone access charges) is much lower than the "cost" imposed on ILECs by prior access charge reforms. Regardless of the impact on individual ILECs, from a larger policy perspective, granting Level 3's Petition would continue the trend of the past ten years to gradually reduce implicit subsidies in ILEC switched access rates⁶ and bring all intercarrier compensation to rates that are closer to incremental costs.⁷

Granting the Level 3 Petition will Enhance Investment and Innovation in the Expanding IP Enabled Services Industry

IP enabled voice applications will soon make a plethora of enhanced features widely available to end users: unified messaging and the ability to integrate voice; data and video applications; the ability to detect a user's presence on the network; privacy protection and safety through customized call screening and routing; and communications routing pursuant to sophisticated user specified preferences such as time of day, calling party number and other parameters.⁸ As the FCC noted in its *Vonage Order*, some of these innovative applications - the

⁵ Level 3's Petition does not apply to IP enabled traffic exchanged with a rural incumbent local exchange carrier ("RLEC") that qualifies for a Section 251(f) exemption. See Level 3 Petition at 8.

⁶ See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order, CC Dockets Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12974-76 (¶¶ 30-32) (2000) ("CALLS Order").

⁷ See, FCC Press Release, *FCC Moves to Replace Outmoded Rules Governing Intercarrier Compensation: Seven Comprehensive Reform Proposals To Be Weighed*, (rel. Feb. 10, 2005) ("Given the rapid changes in telecommunications technology, new rules must accommodate continuing change in the marketplace, provide regulatory certainty and not impede novel technology"); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, at ¶ 4 (April 27, 2001) ("We also seek comment on the potential adoption of a bill-and-keep approach to reciprocal compensation payments . . . and the eventual application of bill and keep to interstate access charges.").

⁸ Level 3 Petition, at 3, 11-14.

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ability to manage an integrated suite of personal communications dynamically on a world wide basis; receive voicemails in emails with the message attached as sound file; or play voicemails back through a computer - are already available.⁹ The pace of such innovation will increase more rapidly if IP enabled services are allowed to continue to develop free of the antiquated access charge regime. Granting Level 3's Petition will foster such innovation by assuring IP providers that they may devote resources to developing and deploying IP enabled applications rather than litigating over intercarrier compensation.

Granting the Level 3 Petition will Promote Retail Price Competition

Deployment of IP enabled voice services is already providing cost savings for consumers, businesses and suppliers as well as providing enhanced features and functionality. For example, Verizon has already cut its VoiceWing VoIP product from \$39.95 to \$29.95, AT&T and Vonage have recently reduced their residential prices by \$5, and Dialpad offers an unlimited calling plan for \$11.99 per month.¹⁰ According to Atlantic-ACM, the mean decrease in communications spending as a result of adopting VoIP for medium and large businesses in June 2004 was 24.6%.¹¹ Even in this period of regulatory uncertainty, IP enabled voice applications are exerting intense pricing pressure and driving down prices for VoIP and traditional PSTN services. Just imagine the price pressure IP enabled services could bring to bear if the FCC affirmed that these applications are subject to reciprocal compensation rather than access charges.¹²

⁹ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, at ¶¶ 4-7 (rel. Nov. 12, 2004) ("*Vonage Order*"); *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, at ¶¶ 16-20 (March 10, 2004) ("*IP Enabled NPRM*") (IP enabled services "might include virtual telephone numbers, directory dialing, automated voicemail attendants, call pre-screening, and call forwarding of pre-screened calls to other IP enabled devices, such as a computer or wireless phone.").

¹⁰ Atlantic-ACM Report *VoIP Revolution 2004-2009*, at 54.

¹¹ Level 3 Ex Parte, WC Docket Nos. 03-266, 04-36 (Jan. 27, 2005), QSI Technical Documentation, *IP-Enabled Voice Services, Impact of Applying Switched Access Charges to IP-PSTN Voice Services*, at 1 ("*QSI Report*").

¹² See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, at 9613, 9616, 9657 (¶¶ 6, 12, 133). The National Telecommunications Cooperative Association and other representatives of the rural telecommunications industry admit that at present "VoIP providers do not compensate ILECs for the uses of their network through access charges." Ex Parte Letter of National Telecommunications Cooperative Association, *et al.*, WC Dockets Nos. 04-36 and 03-266, at 1 (filed Jan. 24, 2005). Joint Commenters take issue with the claim that VoIP providers do not compensate LECs for use of their networks. As enhanced service providers, Joint Commenters compensate LECs for use of their networks by paying local business rates.

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Granting the Level 3 Petition will Promote Expanded Deployment of Broadband Services

There is growing evidence in the market place that IP enabled services, particularly IP enabled voice applications, are beginning to accelerate broadband demand and fuel growth in the entire communications industry.¹³ Continued innovation in IP-enabled services encourages broadband deployment because customers of IP-enabled services must have broadband access to utilize these innovative services.¹⁴ Ensuring that IP-enabled services remain free from legacy access charges will spur increased demand for broadband services. In fact, the *QSI Report* estimates that granting Level 3's Petition will stimulate broadband such that the RBOCs and ILECs not under the rural exemption will see DSL revenues increase by \$269 million through 2008.¹⁵ On the other hand, the higher VoIP prices that would ensue from the application of access charges would suppress demand for both VoIP services and the broadband services that enable them.¹⁶ The *QSI Report* establishes that RBOC and non-rural ILEC revenues for DSL will fall by \$39 million in 2005 and \$56 million in 2006 alone if access charges are applied to IP enabled voice traffic.

Granting the Level 3 Petition is Consistent with the Commission's Policies on Intercarrier Compensation Reform

It makes little sense to apply to innovative IP enabled voice services a legacy access charge system that nearly all parties agree is flawed, at a time when the FCC is poised to reform the entire intercarrier compensation system and move toward bill and keep or lower rates that are closer to incremental costs.¹⁷ The FCC and the telecommunications industry have worked hard

¹³ See, e.g., Press Release, Infotechnics Research, Inc., Cable VoIP Subscribers Jump 900% 2003–2004; Double-Digit Growth in Equipment Spending Expected Through 2007 (Feb. 2, 2005) ("North American cable companies increased their investments in VoIP equipment to keep up with surging subscriber growth, nearly doubling their spending between 2003 and 2004, from \$63 million to \$123 million. Infonetics' forecasts indicate strong growth will continue.").

¹⁴ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 ¶ 5 (rel. Mar. 10, 2004) ("IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services. IP-enabled services, moreover, have increased economic productivity and growth, and bolstered network redundancy and resiliency.").

¹⁵ *QSI Report*, at 5 and Table 2.

¹⁶ *QSI Report*, at 7.

¹⁷ See, FCC Press Release, *FCC Moves to Replace Outmoded Rules Governing Intercarrier Compensation: Seven Comprehensive Reform Proposals To Be Weighed*, (rel. Feb. 10, 2005); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, at ¶ 4 (April 27, 2001) ("We also seek comment on the potential adoption of a bill-and-keep approach to reciprocal compensation payments . . . and the eventual application of bill and keep to interstate access charges.").

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over the past ten years to reduce implicit subsidies in ILEC switched access rates.¹⁸ Section 254(e) of the Act mandates the removal of such implicit subsidies.¹⁹ Confirming that the reciprocal compensation regime applies to IP enabled voice services continues this trend away from implicit subsidies during the transition to comprehensive intercarrier compensation reform.

Universal Service will Not be Harmed by Granting the Level 3 Forbearance Petition

Contrary to the ILECs' baseless alarmism, the *QSI Report* confirms that the universal service system will not collapse if reciprocal compensation continues to apply to IP enabled voice services for an interim period. There would be no financial impact on carriers that fall under the rural exemption because Level 3's Petition expressly excludes the geographic areas served by ILECs that remain exempt under Section 251(f)(1). For other ILECs, the *QSI Report* demonstrates that IP enabled voice traffic will not increase quickly enough to present any significant near term threat to the flow of funds (and implicit subsidies) derived from the existing access charge regime. On the other hand, applying interstate access charges to "non-local" IP enabled services (IP-PSTN) will increase the combined switched access and DSL revenues of the RBOCs and non-rural other ILECs as follows: \$74,941,313 in 2005, \$111,310,115 in 2006, \$159,989,800 in 2007, and \$213,596,195 in 2008. The *QSI Report* establishes that RBOC and non-rural ILEC switched access revenues would increase by \$114 million (1.9% of the total) in 2005 and \$167 million (3.0% of the total in 2006) if access charges are applied to such IP enabled traffic.²⁰ However, the cost of this additional RBOC and non-rural ILEC revenue will be to significantly reduce investment and innovation in IP enabled services and reduce broadband adoption. In any event, as the *QSI Report* demonstrates, "prompt initiation of intercarrier compensation reform reduces both the benefit to ILECs for imposing access charges on VoIP, and the ILEC's vulnerability to VoIP substitution," if any, and its impact on their switched access charge revenues.²¹

The likely reduction in access charge revenues will not damage universal service. Over the next few years, the impact of IP enabled voice applications on RBOC and non-rural ILEC switched access charge revenues is minor compared to previous FCC actions to reduce access charges. For example, the *CALLS Order* for price cap ILECs reduced switched access charges by \$2.1 billion within the first year. This reduction was only partly offset by a new explicit universal service fund that was capped at \$650 million annually (i.e., a net reduction of

¹⁸ See *CALLS Order*, 15 FCC Rcd 12974-76 (¶¶ 30-32).

¹⁹ 47 U.S.C. § 254(e). The Communications Act of 1934 as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. §§ 251-261) (the "Act").

²⁰ *QSI Report*, at 5-6 and Tables 2 and 3.

²¹ *QSI Report*, at 8.

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approximately \$1.45 billion in implicit subsidies).²² By contrast, the estimated reduction to RBOC and non-rural ILEC revenues of maintaining the status quo exemption from access charges for IP enabled applications is \$75 million in 2005 and \$111 million in 2006.²³

Most importantly, the potential impact of IP enabled voice applications on RBOC and non-rural ILEC switched access charge revenues is insignificant compared to the impact that substitution of wireless for traditional toll services has had, and will continue to have on ILEC switched access revenues. Wireless services are commonly used by consumers today to make non-local calls for which LECs formerly recovered switched access charges. The *QSI Report* shows that this substitution of wireless for wireline services dwarfs any projected impact of IP enabled voice services over the next four years. In 2003 for example, wireless substitution accounted for approximately 36% of all interstate voice traffic compared to less than 1% for VoIP. By 2008, it is projected that wireless services will capture 62% of the market for interstate calls, traditional landline 32% and VoIP still only about 6%.²⁴

Section 254(e) of the Act mandates the removal of implicit subsidies that support universal service.²⁵ It is astounding that nine years after the passage of the Telecommunications Act of 1996, SBC admits that access charges, especially intrastate access charges, contain implicit subsidies.²⁶ The Fifth Circuit made clear that Section “254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support.”²⁷ Granting Level 3’s Petition brings the FCC one step closer to ending such implicit subsidies. Granting Level 3’s Petition could also provide the FCC with the “stick” courts have suggested is needed to “induce” the states “to assist in implementing the goals of universal service” by providing *explicit* support for universal service.²⁸

Removing the Unnecessary Uncertainty Regarding the Imposition and Retroactive Application of Access Charges on the Dynamic IP Enabled Services Industry Comports with Prior Commission Precedent Upon Which Providers have Relied

²² See *CALLS Order*, 15 FCC Rcd 12962, 12974-76 (¶¶ 30-32) (“The CALLS Proposal reduces these subsidies, and keeps rates affordable in high-cost areas, by replacing the subsidies with explicit interstate access universal service support”).

²³ *QSI Report*, at 5 and Table 2.

²⁴ *QSI Report*, at 9-10.

²⁵ 47 U.S.C. § 254(e).

²⁶ 47 U.S.C. § 254(e); *SBC Memorandum in Opposition to Level 3’s Forbearance Petition*, WC Docket No. 03-266, at 5, 20, 22 (Feb. 3, 2005) (“It is well established that access charges - - particularly intrastate access charges - - are an important source of implicit support for universal service.”).

²⁷ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999).

²⁸ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204 (10th Cir. 2001).

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Finally, although Level 3's Petition provides the Commission with the option of declining to decide whether access charges should apply retroactively to these IP enabled services, the Joint Commenters urge the FCC to remove any uncertainty and squarely address the issue. Confirming that legacy access charges do not apply to IP enabled services under existing rules will greatly reduce the risk to investors and service providers of incremental investments in innovative IP-enabled services. By not addressing retroactivity directly in the *AT&T Order*,²⁹ the FCC left considerable legal uncertainty as to whether access charges should apply retroactively to the AT&T services at issue and similar services of other providers. As a result, a deluge of unnecessary suits have been filed against AT&T and other IP enabled services companies seeking retroactive access charges.³⁰ Similarly, ILECs have threatened to impose access charges on IP enabled services that clearly do not fall within the category of services affected by the Commission's AT&T Order.³¹ These actions prolong the financial uncertainty which has diminished the investment capital available to providers of IP enabled services.

It would be patently unfair and inconsistent with well established precedent to require payment of access charges on a retroactive basis. FCC precedent has consistently indicated that services that provided enhanced features or involved a net protocol conversion were information services exempt from access charges.³² An FCC decision to apply access charges to a service involving a net protocol conversion would be a "new rule" that under established precedent should not be given retroactive effect.³³ Instead, the FCC should confirm that the services described in Level 3's Petition are exempt enhanced services or information services, and as such the access charge exemption applies both prospectively and retroactively.

²⁹ See *Petition for Declaratory Ruling that AT&T's Phone-to Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. Apr. 21, 2004).

³⁰ See, e.g., *Southwestern Bell Telephone L.P. et al. v. VarTec Telecom, Inc. et al.*, E.D. Mo., Case No. 4:04-cv-01303-CEJ (filed Sept. 24, 2004); *Qwest Communications v. AT&T Corp., et al.*, D. Colo., Case No. 1:04-cv-00909-EWN-MJW (filed May 5, 2004); *Southwestern Bell Telephone L.P. et al. v. AT&T Corp. et al.*, E.D. Mo., Case No. 4:04-cv-00474-HEA (filed April 22, 2004).

³¹ See Letter from Notices Manager, Contract Management, SBC to Jennifer McMann, Director Regulatory Affairs, Level 3 Communications (dated Nov. 19, 2003), *Level 3 Petition*, Exhibit 2.

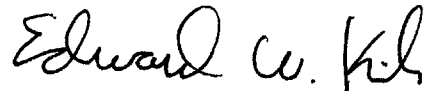
³² See generally *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Reply Comments of Level 3 Communications LLC, WC Docket No. 03-266 (filed July 14, 2004). See also *id.* at 21-35 (explaining that net protocol conversion has historically been used to determine which services are intrinsically information services).

³³ *Verizon v. FCC*, 269 F.3d 1098, 1100, 1109 (D.C. Cir. 2001) ("when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective[]-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'").

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For the foregoing reasons, the Joint Commenters support Level 3's Petition. We hope that the Commission will take decisive action to eliminate the current regulatory uncertainty surrounding which intercarrier compensation mechanism applies to IP-enabled services.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward W. Kirsch".

Tamar E. Finn
Edward W. Kirsch

Counsel for ICG Communications,
Volo Communications, Inc. and
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